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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JADE ALLIANCE, LTD., Plaintiff and Respondent, v. UNIVERSAL METALS, INC., et al., Defendants and Appellants.	B190834 (Los Angeles County Super. Ct. No. BC318745)

APPEAL from a judgment of the Superior Court of Los Angeles County. Morris B. Jones, Judge. Reversed and remanded.

Shlesinger & Nguyen, Mary X. Nguyen and Kimberly G. Shlesinger for Defendants and Appellants.

Leo Pelletier & Wu and Miriam L. Wu for Plaintiff and Respondent.

After a three-day bench trial, respondent Jade Alliance, Ltd. (Jade) obtained a $213,039.89 breach of contract judgment against appellants Universal Metals, Inc. (Universal), Pan Metals Company (Pan Metals), Sonny Nguyen (Nguyen) and David Pan (Pan) (collectively suppliers). The suppliers challenge the $83,200 awarded for Jade's lost profits and the $53,520.25 awarded to Jade for out-of-pocket costs due to breach of contract.[1] We find that the awards for lost profits and out-of-pocket costs were not supported by substantial evidence.

We reverse and remand for a new trial.

FACTS

1. *The first amended complaint.*

On January 7, 2004, Universal and Pan Metals entered into a contract to deliver 4,100 metric tons of quality metals to Jade on or before February 20, 2004. Among the 17 containers received by Jade, eight of the containers were unacceptable. "Contrary to the agreement, the goods received from [Universal and Pan Metals) were all of poor quality as determined and certified as bad by Shanghai [Quarantine] Authority and could only be sold as scrap." Jade sued the suppliers for breach of contract, negligence and intentional tort. It sought return of a $76,300.63 deposit, $53,520.25 in expenses incurred, and $83,200 in lost profits. Nguyen and Pan were not sued for breach of any sort of guarantee.

2. *The bench trial.*

Jade's opening statement

Jade's attorney opened as follows. Jade is a trader, or broker, of scrap metals. In 2003, through one of its brokers, Lee Cheung Steel and Metals Limited (Cheung Steel),

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[1] Nguyen and Pan argue that they cannot be held personally liable because they were not sued for breach of their guarantee and Jade did not put on any alter ego evidence enabling it to pierce the corporate veil. Because we are remanding for a new trial, we need not comment on their liability.

Jade purchased scrap metal from Pan Metals and Universal. There are about five to six contracts entered into in the latter part of 2003. Those contracts were partly performed. There was a dispute as to the unfinished portion. The parties agreed that the unfinished portions of those existing contracts would be replaced by a new contract, contract No. LC04002/P (sometimes referred to as the new contract). The new contract called for the shipment of 4,100 metric tons of heavy melted steel (HMS) scrap metals. Jade was to pay a 20 percent deposit up front and then the remainder after an inspection certificate was provided by a division of the Shanghai Chinese government called CCIC.

Nguyen and Pan signed a guarantee for the new contract.

The scrap metals were to be delivered by February 20, 2004, but by that date only 500 metric tons were delivered. Sometime in April 2004, the suppliers shipped 17 containers directly to Jade's clients in Shanghai, China. The containers held bundle scrap consisting of motor crushed lump instead of HMS scrap. China has a law prohibiting the importation of bundle scrap that is motor crushed lump because it poses an environmental hazard. The Chinese government confiscated and quarantined all 17 containers.[2] As a result, there were various charges for penalties, demurrages and fees for inspection, cleansing and sanitizing. Jade's clients made claims to the suppliers, but those claims were ignored. Only about 500 to 800 metric tons of the 4,100 metric tons were actually delivered.

Jade lost it deposits and profits

The suppliers' opening statement

According to the suppliers' attorney, the terms of the new contract were that the suppliers would provide all of the import logistics, including the bill of lading, invoicing

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[2] It is unclear how many containers were quarantined. At oral argument we were informed that eight containers were confiscated by the Chinese government. In Jade's opening statement, its counsel averred that "when 8 of the 17 containers were found to be motor-crushed lumps, the government confiscated and quarantined every single one of these 17 containers." Whether only eight were confiscated, or all 17, our analysis remains the same. And, in any event, it appears that only eight containers were purportedly unacceptable.

and the necessary certificates. After the new contract was signed, Jade contacted the suppliers and said that Jade would handle all the logistics. All the suppliers had to do was ship the goods to China.

Because Jade was in charge of the logistics, it was responsible for failing to get the proper certificates. Jade was responsible for the quarantine in China.

Jade's business

According to Tong Waiyee (Tong), the director in charge of operations at Jade, the business of Jade is to purchases metals overseas and then sell them to end-users in China. Justin Chu (Chu), the owner of Cheung Steel, bought and sold scrap metal on Jade's behalf.

Various 2003 purchase contracts and 2003 sales contracts

As exhibit 11 at trial, Jade offered various 2003 contracts and a summary of those contracts indicating that metals were acquired from Pan Metals and then sold at higher prices to third parties.

The first series of contracts, denoted as the AA series in exhibit 11, consisted of a contract through which SB International, Inc.[3] purchased metals from Pan Metals for delivery on November 20, 2003, a contract through which Jade sold metals to Orient International Holding Shanghai Foreign Trade Corp., LTD. (Orient International), and a contract through which Cheung Steel sold metals to Shanghai International Enterprise Import & Export Co. Ltd. (Shanghai International).

The BB series of contracts contained contracts evincing Jade's purchase of metals from Pan Metals, identified as contract No. LC031002B/P, and then Cheung Steel's sale of metals to Shanghai International.

The next series of contracts, the CC series, showed that Jade purchased metals from Pan Metals in contract No. LC031005B/P, and then sold metals to Orient International.

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[3] The record reflects that SB International was acting on Jade's behalf.

As depicted in the DD series, Jade purchased metals from Pan Metals in contract No. LC031007/P, and then Cheung Steel sold metals to Orient International. When asked why Jade was not the seller of the metals, Tong replied: "Because [Cheung Steel] represent [Jade] to purchase the goods."

Last, the EE series of contracts contained a purchase contract between Jade and Pan Metals identified as contract No. LC031102/P, and a sales contract between Cheung Steel and Orient International.

Contract No. LC04002/P

Exhibit 1 contained a January 7, 2004 fax, from Cheung Steel to "Pan Metals Co./Universal Metals Inc." It stated that both parties "have agreed to replace the following unfinished portion of the original contracts with the new contract LC04002/P." The original contracts were identified as the contract through which SB International, Inc. purchased metals from Pan Metals for delivery on November 20, 2003, contract No. LC031002B/P, contract No. LC031005B/P, contract No. LC031007/P, and contract No. LC031102/P.

The fax noted that SB International, Inc. had paid a deposit of $43,840, and Jade had paid three deposits totaling $80,000.[4] Exhibit 1 referenced a sixth contract, which involved a company identified as Southern Materials (HK) Holdings Ltd. The fax stated that the new contract had to be executed before the old contracts were deemed canceled. Deposits paid under the old contracts were transferred to Universal's account in the new contract.

Exhibit 1 also contained the new contract (the January 7, 2004 contract, by which Jade purchased 4,100 metric tons of metals from Universal). The new contract was identified as contract No. LC04002/P.

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[4] The appellate record contains two copies of the January 7, 2004 contract between Jade and Universal identified as contract No. LC04002/P. The first was appended to the superseded original complaint. There is no indication in the record that the second copy was a trial exhibit.

According to Tong, the new contract, or contract No. LC04002/P, "replaced the original contract, unfinished contract."

Jade's shipper

As related by Tong, Shanghai Alison Import and Export Company, Ltd. (Alison) notified Jade that 17 containers were shipped out. The containers were inspected and eight contained motor crushed lumps. They were supposed to contain "H.M.S. number 1 and number 2."

Jade's damages

Tong testified that Jade suffered $83,200 in lost profits in connection with the purchase contracts in contract series AA, BB, CC, DD, EE and FF,[5] which, all told, represent the purchase of 8,300 metric tons of scrap metals. The purchase contracts in series BB, CC, DD, EE and FF, were, respectively, contract Nos. LC031002B/P, LC031005B/P, LC031007/P, LC0311002/P and LC031008/P. The purchase contract in series AA did not have a contract number. According to Tong, the purchase contracts in exhibit 11 "reflect" the new contract, contract No. LC04002/P. The new contract represents Jade's purchase of 4,100 metric tons of scrap metals. Later in the trial, when Tong was asked about the first contract in Exhibit 11, she stated that it "has nothing to do with the 17 containers that were quarantined."[6] She said the same with respect to every other contract submitted as part of Exhibit 11.

Exhibit 5 at trial was an April 5, 2004 fax, from Alison, Jade's shipper, to Cheung Steel. It stated that a total of 17 containers "were inspected by the customs a few days ago. Eight of the containers were found to be motor crushed lumps. One container . . . was press pile." According to the fax, Alison had worked with Cheung Steel "to

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[5] Jade did not offer the FF series of contracts into evidence (or it is otherwise missing from the appellate record). The summary on the first page of exhibit 11, however, listed an FF series of contracts.

[6] Once again, we note that the record is not clear regarding the number of containers that were quarantined.

import steel scrap HMS No. 1 & No. 2" under contract No. 2K04I-M010Z. The container under contract No. 2K04I-M009Z held press pile.

Jade offered exhibit 9 at trial. It was a list of Jade's expenses and stated that Jade claimed a right to recover $53,520.25. Trial exhibit 12 contained bills of lading from Richfield Logistics, Inc., invoices from Universal, and pictures of containers full of scrap metal.

The guarantee

Nguyen and Pan signed a guarantee for a January 7, 2004 contract, which was identified as contract No. LC04002/P.

Jade's closing argument

In Jade's final oration, its attorney averred, inter alia, that the new contract was not in dispute, nor were the guarantees. A breach was evident, and Jade showed all of its damages in detail. It was entitled to its lost profits in connection with the 17 containers that were quarantined.

The suppliers' closing argument

The suppliers argued that the parties modified the new contract, agreeing that Jade would be responsible for the bills of lading and CCIC certificates, and that Jade breached the new contract by not making payments. As for the 17 containers, the suppliers' attorney stated: "[Jade has] failed to show that the 17 containers in question . . . contained motor-crushed lumps. They had their expert . . . testify . . . [and] he couldn't even tell . . . that there were motor-crushed lumps in this case." There was no evidence Jade ever inspected the 17 containers. "All they did was receive a letter that says we got crushed lumps, 17 containers."

3. *The judgment and this appeal.*

A judgment was entered against Pan Metals, Universal, Nguyen and Pan in the amount of $213,039.89, which included $76,319.64 for deposits, $53,520.25 for inferior products, and $83,200 for lost profits.[7]

This timely appeal followed.

STANDARD OF REVIEW

When an appellant attacks the sufficiency of a trial court's factual determinations, "the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874.)

DISCUSSION

1. The law of contract damages.

For purposes of a breach of contract action, "the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code, § 3300.) Additionally, "[n]o damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." (Civ. Code, § 3301.) In other words, unless contract damages are foreseeable, they are not recoverable. (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226

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[7] The appellate record contains what purports to be an amended judgment. It differs from the original judgment in that it awarded Jade $33,086.80 in costs. We note that this purported "amended judgment" is neither signed by the trial court nor file-stamped. The issue of costs was not raised on appeal, so the existence of the "amended judgment" is moot.

Cal.App.3d 442, 455–456.) "[E]vidence of lost profits must be unspeculative and in order to support a lost profits award the evidence must show 'with reasonable certainty *both* their *occurrence* and the *extent* thereof.' [Citation.]" (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907.)

2. Lost profits.

According to the suppliers, there is no evidence that Jade lost the profits set forth in exhibit 11.

The suppliers are correct.

The evidence of lost profits was set forth in the summary on the first page of exhibit 11 at trial and was represented by the price differentials between the purchase and sales contracts. Jade's theory at trial was that the quarantining of 17 containers caused its lost profits, i.e., due to the delivery of inferior scrap metals and the subsequent quarantine, it could not deliver certain scrap metals to its customers and get paid. But Tong testified that the contracts in exhibit 11 had nothing to do with those 17 containers. Thus, there was no evidence demonstrating that the profits from the sale contracts in exhibit 11 were lost, or that the suppliers breached the purchase contracts in exhibit 11 by delivering inferior scrap metals. In the absence of such evidence, there is no way to ascertain if Jade suffered the claimed profit loss.

Additionally, we note that the new contract superseded the partially performed purchase contracts in exhibit 11. The new contract, which was ostensibly at issue during trial, pertained to 4,100 metric tons of scrap metals. The contracts in exhibit 11 pertained to 8,300 metric tons. As a result, the buying prices, selling prices and price differentials cannot be applied to the new contract. At least some of those variables necessarily have to be different because the new contract involves less than half the metric tonnage. Moreover, it cannot be disputed that the lost profits must relate to the new contract, the only contract in effect. The problem for Jade is that the figure of $83,200 relates to purported lost profits in connection with the sale of 8,300 metric tons of scrap metals rather than the sale of 4,100 metric tons.

Our dilemma is illustrated by reviewing the numbers. We note that in the AA series of contracts, which relates to 800 metric tons of "P&S" and 2,000 metric tons of HMS, the buying price is listed as "163," the selling price as "172," the profit as "9" and the profit loss as "7,200." It cannot be ascertained whether any of these numbers are identical in the new contract, and the inference is that they are not identical due to the partial performance. Moreover, the summary of contracts in exhibit 11 reveals that different types of metals were involved in the contracts and that there are different profit margins for the resale of those metals. There is nothing in the record that permits us to quantify how much profit was lost from the most valuable sales as opposed to the least valuable sales. Any way we turn, this record provides us with a conundrum that we are not given the tools to resolve.

In its appellate brief, Jade directs us to consider exhibits 4, 5 and 6 in its respondent's appendix.

Exhibit 4 contains 13 pages, and some of the content is in Chinese. One of the pages is a memo regarding "penavico" and tariff, and it relates to contract No. 2K04I-M010Z. Two pages are Shanghai customs authorized value added tax collection payment certificates for Alison. Several pages purport to relate to quarantine. This evidence, however, does not establish that Jade suffered damages with respect to the contracts in exhibit 11. Exhibit 5 is devoid of any reference to the purportedly material transactions. Likewise, exhibit 6 lends Jade no assistance. It is entitled "Record of Remittance Made to Pan Metals/Universal Metals," but it contains no reference to the purchase and sales contracts set forth in exhibit 11.

The evidence, on this record, is insufficient to establish that Jade suffered lost profits in the amount of $83,200.

3. Out-of-pocket costs incurred due to breach of contract.

The suppliers contend that the award of $53,520.25 for out-of-pocket costs was not supported by credible evidence. We concur.

To prove that it incurred $53,520.25 in out-of-pocket costs due to breaches by the suppliers, Jade offered exhibit 9 at trial. The first page was a summary of those purported

expenses.[8] Tong was asked how Jade suffered the damages. She testified: "Because the H.M.S. we ordered became steel scrap, then these costs to us were generated." She was then asked if Jade actually paid out $53,520.25 due to the generated costs, and she replied: "As I know, part of it was offset by [Alison]." Later in the trial, Tong was asked if Jade paid exhibit 8, which was a fax from Alison stating that there was a total loss of $42,560 relating to the 17 containers that were quarantined. She said that Jade did not "pay directly to the amount that they requested." Asked the same question again, she said: "Well, [Alison] still owe us two or three invoices. One of the invoices valued about $20,000 and they have not paid yet." Jade's counsel said, "Is it fair to say that you don't know how much of this exhibit 8 . . . was paid to [Alison]?" She replied, saying, "I don't know. I just know that they should have offset amount between the invoices that they owed but exactly how much, I don't know." Counsel again asked how much of the expenses in exhibit 9 Jade paid. The trial court cut off the questioning, stating: "She's told you she doesn't know how much they paid."

Tong did not provide any testimony establishing the actual amount of Jade's out-of-pocket costs with respect to the 17 containers.

In the opening section of its appellate brief, Jade adverts to *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873–874, a case that held that where "the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.] The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. [Citation.]"

Here, there was no reasonable basis for computation. According to Tong, some of the $53,520.25 was offset by Alison. As well, she stated that she did not know how much Jade actually paid. The issue is muddied because in exhibit 8, only $42,560 in

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8 The expenses were for import duty, depot charges, document fees, declaration fees, container handling, penavico charges, customs checks plus container detaining, inspection sterilization, drayage charges, demurrages, licenses for environmental protection, and import agent fees.

losses was listed. To us, the variables for properly awarding $53,520.25 in out-of-pocket costs are not discernable.

Jade informs us that the trial court "determined that the goods delivered to [Jade] were inferior, and [Jade] is entitled to [an] award of damages. [¶] [Jade] submitted the receipts relating to the disposal fees, demurrage and other relevant expenses incurred by the inferior goods delivered by [the suppliers]. The Judgment did not specify whether the award of $53,520.25 for inferior goods was based on which causes of action as alleged by the First Amended Complaint. . . . As such, [the] trial court's award could be based on any number of causes of action as long as it [was] just and reasonable. Accordingly, [the] trial court's decision supported with substantial evidence must be affirmed."

This argument does not defend the judgment because it does not explain how the out-of-pocket costs were calculated.

4. The proper disposition of this appeal.

This appeal raises limited issues, which triggers this question: should this case be remanded for a complete retrial or a limited retrial?

We have the "'power to order a retrial on a limited issue, if that issue can be separately tried without such confusion or uncertainty as would amount to a denial of a fair trial.' [Citation.] The underlying rationale is easy to discern: To require a complete retrial when an issue could be separately tried without prejudice to the litigants would unnecessarily add to the burden of already overcrowded court calendars and could be unduly harsh on the parties. [Citation.]" (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 776.)

In our view, a limited retrial would result in confusion and uncertainty. While reviewing the record, it was difficult to discern which of the many contracts was actually being litigated, and how any of them related to damages or, for that matter, the 17 containers that were shipped by Alison. A limited retrial would run a substantial risk of resulting in an unfair trial.

All other issues, including the individual liability of Nguyen and Pan, are rendered moot by this opinion.

DISPOSITION

The judgment is reversed and the matter is remanded for a new trial. The suppliers shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ